The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity

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I. INTRODUCTION

The question presented by the issue of enforceability of mediated agreements is not the question of which types of problems ought to be mediated and which litigated. Still the *reasons* one gives for one's answer to the latter question reflect the basic understandings of the two processes that will affect one's conclusions about enforceability. In this essay I try to describe why, in the most general terms, mediation may be employed as well as litigation and thus why, again at that same level of generality, persons who first mediate may then properly decide to litigate. I assert that this sequence from problematic relationship to necessarily partial consensual resolution to litigation is a sequence that contract law generally takes account of, though scholars differ as to the significance and interpretation of relational and consensual aspects.

Mediation as the chosen way from problematic relationship to consensual resolution does not, I conclude, so alter the nature of relationship or consent as to justify a separate rule on enforceability, though the considerations that may suggest mediation rather than litigation may also lead a contracts court not to find enforceability. I find that the real concern that argues for non-enforceability is an understandable fear that the possibility of litigation may in various ways distort the course of mediation. Those concerns are real but should be addressed in ways other than adopting a special rule on enforceability for mediated agreements.

The substantive contexts within which mediation occurs vary enormously.[1] This partially explains why very little of a systematic nature has been written about the generalized topic of the enforceability of mediated agreements.[2] Contract mediation and grievance mediation in

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1. *See e.g.*, 29 U.S.C., § 172 (1982) (function of Federal Mediation and Conciliation Service in general labor relations); 45 U.S.C. § 155 (1982) (mediation of labor relations within railway industry); 25 U.S.C. § 640d (1982) (mediation of Native American tribes' claims); CAL. CIVIL CODE § 4607 (West 1983), KAN. STAT. ANN. §§ 23-601 to 23-603 (Supp. 1985) & OR. REV. STAT. §§ 107.755-107.785 (1984) (custody and visitation disputes); ME. REV. STAT. ANN. tit.19, §§ 636, 665 (Supp. 1986) (annulment and divorce); CONN. GEN. STAT. §§ 54-56m (1985) (minor criminal cases); HA. REV. STAT. §§ 571-31.4 (Supp. 1984) (mediation of juvenile offenses by neighborhood panels); R.I. GEN. LAWS § 42-42-5.1 (1984) (mediation and arbitration of consumer disputes); COLO. REV. STAT. § 38-12-216 (1973) (mediation for mobile home owners); FLA. STAT. § 44.201 (Supp. 1986) & MINN. STAT. § 494.01 (Supp. 1987) (general community dispute resolution).

2. Freedman, Are Mediation Agreements Enforceable? ABA Special Committee on Dispute Resolution (1981); ABA Special Comm. on Dispute Resolution, Briefing: Enforceability (1981).

the labor field, neighborhood justice mediation of landlord-tenant disputes or consumer complaints or neighbors' property disputes, and mediation of disputes of continuing or divorcing families present vastly different personal and legal contexts within which mediation may take place and result in agreements. In addition, there exists a major procedural divide with significant variations from jurisdiction to jurisdiction. Many mediated agreements are entered as court orders after searching judicial scrutiny[3] and these agreements are subject to widely varying rules as to finality and remedy for violation.[4]

Unlike the subjects of confidentiality and liability, enforceability is not an issue specific to the subject of *mediation;* rather, enforceability issues arise under contract law and civil or criminal procedure. This wide variety of applications makes apparent the fact that enforceability is not amenable to universally applicable model legislation. The question here was whether the *mediated* nature of some agreements should necessarily lead to legal consequences for enforceability. The proposed legislation embodies the conclusion that the mediated nature of an agreement may tell very little about whether it should be enforced. Asking the question of the enforceability of *mediated* agreements does not, then, cut at the joints of the general problem of enforceability of agreements. This seems true whether or not the agreement is entered as a consent decree or other final order.

II. MEDIATION AND ENFORCEABILITY: THE OPTIONS

Legislation controlling the enforceability of mediated agreements could take several forms. Of course, legislation could embody different

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3. *Compare* FED. R. CIV. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.") with FED. R. CIV. P. 41(a)(1) ("[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of a dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.").

4. *See e.g.,* FED. R. CIV. P. 60(b)(5); Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts,* 64 TEX. L. REV. (1986). The determination that a certain order will be given a lesser or greater degree of finality may be a function of the operation of purely procedural rules (prescribing, for example, that the order was procedurally a final, not an interlocutory order, since it did in fact dispose of all matters in controversy and did so "with prejudice.") *See e.g.,* 6A MOORE, MOORE'S FEDERAL PRACTICE ¶ 59-01 et. seq. (2d ed. 1986). On the other hand, it may evince a substantive judgment that certain kinds of orders ought not lightly to be modified. Some state laws have ascribed this higher degree of finality to child custody decrees, in order to embody a normative judgment that stability was important to children's psychological wellbeing. *See e.g.,* ILL. REV. STAT., ch. 40, para. 610 (Supp. 1986).

rules in different substantive areas. As I will explain at greater length below, all the rules must be formulated in relationship to the contract law that generally controls enforceability. It would, I think, be wholly inappropriate to attempt, in an *a priori* manner, to specify the contexts in which one rule would apply rather than another. All I can hope to do is to set out the major considerations in favor of adopting the rule which, it seems to me, ought *in general,* to be adopted[5] and then the considerations that weigh in favor of the other rules. The question of whether, in a particular context, with all its dense legal and social complexity, those considerations weigh in favor of an alternative rule, must be an issue of political judgment.[6]

For example, a mediated agreement might be enforceable under the same circumstances as other agreements, applying contract doctrine. These enforceability rules might or might not be codified.[7] Another option is that the mediation could be enforceable where, but for the mediation, the agreement would be unenforceable under contract law. The mediation might be enforceable only if the agreement contains an express clause stating that the mediation will be enforceable in a court of law. On the other hand, the mediation might generally be enforceable unless the parties expressly agree that it not be enforceable.[8] Finally, mediated agreements might never be enforceable, even if the parties expressly agree to enforceability.

The necessary background to any discussion of model legislation affecting the enforceability of mediated agreements must be the brooding omnipresence of contract and contract law. The following discussion of model legislation is divided into two steps. First I discuss the implications of simply allowing "pre-existent" contract law to determine enforceability. Second, I try to imagine the considerations that would lead to the adoption of another rule. In the end, I do not find those considerations persuasive, largely because contract law is itself such a flexible instrument and the considerations which would weigh in favor or against enforceability already exist, albeit in a manner which cannot *determine,*

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5. It's the peculiar nature of the "rule" that I think ought to be adopted that saves this itself from being a bit of *a priorism.*

6. *See* R. BEINER, POLITICAL JUDGMENT (1983).

7. On the advantages and effects of codification of common law rules *see* Gilmore, *On Statutory Obsolescence,* 39 U. COLO. L. REV. 461 (1967); Stone, *A Primer on Codification,* 29 TUL. L. REV. 303 (1955).

8. This option is not truly discontinuous with the second option since contract law itself addresses the question of whether a provision in an agreement that the agreement not be enforceable is itself "enforceable." Contracts providing that the parties intend that the agreement not be enforceable in court are common, especially in international trade. 1 CORBIN ON CONTRACTS § 8 (Kaufman Supp., 1984) 1 WILLISTON ON CONTRACTS § 21 (1959). Normally, courts will honor such contractual stipulations. *Id.;* Kind v. Clark, 161 F.2d 36 (1947); In re H. Hicks & Son, 82 F.2d 277 (1936). I include it as a separate option merely to make the possibility of such a stipulation explicit.

in the strongest sense, the outcome in particular cases.[9]

III. THE CONTRACTS BACKGROUND

Contract law contains a set of flexible doctrines that bear on the issue of the enforceability of agreements. Of course, much has been written on the basic issue of contract formation: the requirement of "parties, consent, consideration and obligation[,]"[10] all of which are traditional elements required before courts will find enforceable contractual obligation. Beyond the doctrines that articulate the *prima facie* elements of contract formation, there is a second set that embodies defenses to enforcement. Some affect the quality of assent to be bound and, as one would expect, commentators have sought to justify these doctrines[11] in ways consistent with their basic justifying principles of contract law.[12]

Another set of doctrines relating to assent to be bound concern "mistake."[13] Other doctrines define the situations under which misrepresentations, positive concealment, and failures to disclose may serve to defeat the enforceability of an agreement.[14] Where a party threatens criminal action or other physical or economic injury, even under some

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9. This is not to assert that contract *doctrine*, particularly in its systematic elaborations, is the sole source of the considerations that contracts courts find persuasive. *See* Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 576 (courts actually invoke distributive and paternalistic norms not embodied in contracts doctrine). Nor is it to assert that contract law is free from internal stresses. Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981).

10. Farrington v. Tennessee, 95 U.S. 679 (1877). RESTATEMENT (SECOND) OF CONTRACTS §§ 9, 18, 71 (1981).

11. *See e.g.*, Levin & McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 24, 54-63 (1983).

12. The agreements of infants and persons suffering from mental illness, for example, are in many situations voidable by the child or mentally ill person. RESTATEMENT (SECOND) OF CONTRACTS §§ 14, 15 (1981); 1 CORBIN, *supra* note 8, at §§ 6, 146, 147, 227. In some jurisdictions, the child may disaffirm the contract only upon the return of consideration, *see* 1 WILLISTON, *supra* note 8, at § 238, and in others certain contracts by minors will be enforceable on policy grounds, such as those in which a minor agrees to support an illegitimate child or by which he agrees to pay for necessities, the former rationalized on "public policy" grounds and the latter perhaps on a theory of "quasi-contract." 1 CORBIN, *supra* note 8, at 19. Likewise, difficult distinctions are made between mental illnesses affecting control over behavior. RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981). It is not unusual, at least in the neighborhood justice context, for mediators to involve minors or persons with mental illness. 3 CORBIN, *supra* note 8, §§ 597-605.

13. Here again one finds a complex set of interrelated doctrines and exceptions subject to varying interpretation and justification. The second party's awareness of a misstatement of the first person's intention, one party's awareness that the other party attached a differing interpretation to an ambiguous contract term, the mutuality of mistake, and the moral and policy considerations bearing on the assignment of the risk of unilateral mistake, and the level of fault that inheres in the particular mistake may all bear on the question of enforceability.

14. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

circumstances, where the latter is not criminal or tortious, the doctrine of duress may defeat the enforceability of an agreement[15] and, where a fiduciary relationship exists, the doctrine of undue influence may have the same effect.[16] Most jurisdictions recognize the defense of unconscionability; the law governing the extent to which courts will invalidate, as unfair, terms in contracts of adhesion is quickly developing.[17] Then there is the whole range of doctrines that bar enforceability of contracts on public policy grounds, such as contracts to perform criminal or tortious acts, contracts that violate the antitrust laws, or those which impair family relationships.[18] Another set of doctrines, which have often been developed in a specific substantive legal context, define the set of circumstances under which a person may relieve another of duties or liability imposed by statute or common law.[19]

I review this hornbook law only to illustrate the great range of questions that surround the question of the enforceability of any agreements, whether mediated or not. Many of the legal standards in this area are so open-textured that highly individualized equitable considerations may affect the determination of a judge or jury as to whether a particular agreement ought to be enforced.

The most generalized question for possible legislation is whether the mediated nature of some agreements should have consequences for enforceability which modify, *as a matter of law,*[20] the rules that would otherwise apply to determine enforceability. It is possible that state legislation could give the mere fact of mediation specific legal enforceability. This would serve to preclude the introduction of all evidence relevant to the traditional contract defenses. I believe that such a policy wrongly ignores policy considerations that support allowing defenses such as those utilized in contract law.[21]

I say "as a matter of law" because events that transpired in the course of a mediation that resulted in an agreement are obviously relevant to many of the contract doctrines that affect enforceability of that agreement. The party's performance during the course of the mediation

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15. 13 WILLISTON ON CONTRACTS § 1603 (1959).

16. *Id.* at § 1625. *See also* RESTATEMENT (SECOND) OF CONTRACTS (1981) § 177.

17. 1 CORBIN ON CONTRACTS § 128 (1963).

18. 6A CORBIN ON CONTRACTS §§ 1373-78 (1963).

19. *See e.g.,* ILL. REV. STAT. ch. 110, § 9-201 (1984) (waivers of notices of termination in standard lease valid).

20. For example, a rule might be adopted, following Option Number 1 described above, that provided that juveniles may be permitted to bind themselves contractually if the agreement was the result of a mediation. If mediators' self-understanding and reliably observed professional ethics required them to enhance the understanding and quality of the minor's deliberation and to prevent "unfair" results, this rule might recommend itself to a greater degree. Such rules would tend to make more sense where, as in the example, they served to qualify a broad generalization.

21. *See supra* notes 12, 13.

may provide evidence of his mental capacity to contract. It may be apparent from statements made during the mediation that one party knew or did not know that the other party was misstating his intention in the final agreement (though the relatively full discussion of terms in the presence of a perceptive third party should make this less likely). Furthermore, the presence of and action of the mediator in the course of the mediation may well be evidence of one party's knowledge of facts or law or the full consideration given to the (extraordinary) risks involved in a certain agreement. What the mediator saw, heard, and did may itself be relevant to the issue of enforceability. Under most circumstances, and in the absence of a special rule affecting mediation, the presence of a mediator acting according to what I assume to be the standards generally applicable to the conduct of mediation, will increase the likelihood that an agreement will be found enforceable by improving the parties' knowledge and the quality of their deliberation.

A more generalized argument from contract law would rely not on events that occurred during the mediation but on the mere fact that mediation took place. The fact that the parties engaged in mediation evidences the parties' (or at least the initiating party's) intent to be bound. All contracts are interpreted against the background of the relationships between or among the parties and there are, of course, many opportunities short of seeking out the help of a third party to reach agreement. Traditionally, many persons have gone to third parties (older relatives; ministers) because their previous understandings of their relationships have not held up. Even in these more informal settings, the course of their dealings might well indicate that what they were seeking was precisely a more formal agreement that would have the added sanction at least of the disapproval of the third party. When parties seek out a mediator to allow them to reach an agreement, generally they are seeking a formalization, with legal effect, of a relationship that has become problematic. The very fact that the parties have entered into mediation illustrates their mutual commitment to a *relatively* greater resort to public norms than would an attempt to resolve the problematic situation privately.

The question that this raises closely intersects with the issue of confidentiality and evidentiary privilege in mediation and again points out the tension between the spirit and needs of the two forums. Where one of the traditional defenses to contract enforceability is raised, the mediator will often have evidence, perhaps the best evidence, going to the issue of mistake or knowing assumption of risk. Further, he or she will often have an opinion, in some circumstances admissible either as an expert or at least as lay witness opinion, regarding one of the

participant's state of mind.[22] The evidence may come from statements made either by one of the parties or by the mediator himself (where notice is a crucial issue) either in joint session or in caucus. This may well be the context within which at least some issues of confidentiality and evidentiary privilege arise. It is, of course, also possible that a party seeking to void a mediated agreement might seek to introduce evidence to the effect that the mediator actively misinformed him of the facts, the law or the evidence, or perhaps, evidence of more subtle kinds of psychological pressure.[23] Attention ought to be given to these contract defenses, particularly duress and mistake, in framing codes of mediator ethics either at the state level or within particular agencies, especially if the mediator is representing that the agreement will be enforceable.[24]

An issue closely related to mediator ethics (and potential liability) is the responsibility of the mediator to the enforceability of the agreement. Macaulay's empirical studies of the behavior of businessmen in the formation of commercial contracts found that businessmen often gave very little thought at the time of agreement to the legal effect of many contract provisions that they believed important:

> There was a time when courts in the United States refused to enforce a contract in which the seller agreed to supply all of the buyer's requirements of particular goods. Insofar as these decisions had any policy basis, they appear to express the belief that sellers ought not assume a commitment,

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22. FED. R. EVID. 701-05. One participant at the Ohio State conference recounted a story where a participant in mediation undertook litigation to challenge the other party's interpretation of a term in the mediated agreement. He did this only because he was aware that, under the controlling statute, the mediator himself would not be permitted to testify to the meaning of the term that was clearly understood by the parties as a basis for the agreement. This is an example of a case where a rule designed to further the process of mediation leads to a kind of corruption *because of the relationship between mediation and litigation.*

23. Duress need not be at the hands of another party to the contract. RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981) provides: "If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction." There is also a trend toward enlarging the sorts of "pressure" that may constitute duress beyond the traditional threats to life and limb. Rubenstein v. Rubenstein, 20 N.J. 359, 361, 120 A.2d 11, 11 (1956) ("Under the modern view, moral compulsion or psychological pressure may constitute duress if, thereby, the subject of the pressure is overborne and he is deprived of the exercise of his free will, and the question is whether consent was coerced.") *But see* Regenold v. Baby Fold, Inc., 68 Ill.2d 419, 433, 369 N.E.2d 858, 864 (1977), *appeal dismissed* 435 U.S. 963, 98 S.Ct. 1598, 56 L.Ed. 2d 54 (1978) ("mere advice, argument, or persuasion does not constitute duress or undue influence" by a state agency which persuaded a mother under extreme personal stress to give up a child for adoption).

24. Here it might well be relevant that mediators in general or the mediating agency for which the mediator works measures its success by the percentage of mediations in which agreements are reached. It would certainly seem that cross-examiners worth their salt would pursue this line vigorously in a case to defeat enforcement of the agreement.

> fixed price while receiving so little in return. Curtis Reitz notes that one legal scholar said that such a rule had wreaked havoc within the commercial community. But it did no such thing: the commercial community continued to make "requirements" contracts, apparently unconcerned whether or not they would be legally enforceable. This business relationship was too useful to sacrifice by invoking the formal rules of contract law.[25]

In the vast majority of cases both sides substantially perform as agreed. In those cases, concern with legal enforceability may prevent the parties from reaching an agreement that is in their interests. It is often the case that in the course of mediation the parties will come to an agreement some terms of which are legally unenforceable. This is especially true where the party against whom the unenforceable provision operates gains the benefit of other provisions of the agreement and then himself fails to perform.

Should a mediator be ethically or legally responsible to ensure the enforceability of a mediated agreement? Should he be responsible to at least raise the issue when he has reason to believe that the agreement may not be legally enforceable? Is the mediator responsible for being informed of the legal issues surrounding enforceability in the areas in which he mediates? Is there a different responsibility if the mediator is a lawyer? What if he or she *in fact* knows that a particular provision is not enforceable?

I have here suggested that contract law already contains the doctrines relevant to the question of enforceability of agreements, mediated or not, and have tried to indicate in a preliminary way some of the collateral issues that the interrelation of mediation and litigation pose. In the next section I want to take a broad perspective in considering whether mediated agreements should be irrebuttably unenforceable, thus allowing for a sharp wedge to be driven between mediation and litigation.

IV. MODELS OF MEDIATION AND LITIGATION

The relationship between mediation and litigation involves very basic and very subtle questions.[26] I hope to lay out some of the interconnections

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25. Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 524 (1977).

26. I shall in general assume that the legislative perspective on the question of enforceability should not differ markedly from that of a common law court making the same determination. That assumption is the result of the argument to the effect that there is no inexorable moral, logical, or legal conceptual link between the mediated nature of an agreement and its enforceability. Thus I support the symposium consensus as a matter of policy that "An agreement reached as a result of mediation shall be enforceable under the law which governs enforceability of agreements generally." It is difficult, however, to conceive of the legislative context within which such a general statement would be appropriate. Most legislation controlling mediation has, for good reason, been much more context-specific.

of possible resolutions of this question to the competing metaphors through which we think about mediation, legislation, and litigation. At stake is the relative importance of and appropriate relationships between two different modes of social ordering, mediation and litigation. This is not a simple matter.

Insofar as one contemplates model *legislation,* one must consider the degree to which or the manner in which the concrete practice of mediation ought to take account of litigation, the other means of social ordering to which the parties may eventually resort. Which casts and ought to cast the stronger shadow: mediation or litigation?[27] Which should adapt its practice to which, and in what contexts?[28]

The considerations that bear on the issue of the enforceability of mediated agreements are the same considerations that have long been discussed in a different idiom by contracts scholars. The latter have sharply disagreed as to whether the promise itself or the overall context of the relationship is the source of contractual obligation.[29] From a "promise-centered" perspective, the agreement struck after mediation will generally be entitled to enforcement as a promise, though the factual circumstances surrounding the mediation obviously affect the extent to which the promise ought to be enforced. The mediation process is viewed as the means by which parties are able to reach the "meeting of minds" which is embodied in the agreement.[30] From a more "relational" perspective, the mediation is not so much a means by which to reach the crucial meeting of minds but, rather, an intensive part[31] of a process

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27. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950 (1984).

28. Mediator tort immunities or "privilege" may be examples of litigation "taking account" of the distinctive needs of mediation and to "compromising" its own procedures. Alternatively, a requirement, enforceable in tort, that the mediator discuss explicitly the legal enforceability of each of the terms of an agreement may "compromise" the practice of mediation.

29. *Compare* C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) *with* I. MACNEIL, THE NEW SOCIAL CONTRACT (1980) *and* LEVIN & MCDOWELL, *supra* note 11.

30. Very basic questions of categories were at issue in the Ohio State discussion. One view forcefully presented was that mediation was not truly mediation but only "therapy" if it did not lead to a legally enforceable agreement. There is, as is inevitable, a very interesting implicit typology of human relations at work here. These questions of what therapy, mediation, and trials "are" presuppose the most basic philosophical commitments and are unintelligible without a full explication of these background commitments. *See* A. MACINTYRE, AFTER VIRTUE (1981) (basic discontinuity between moral and therapeutic discourse). Many of the debates surrounding alternative dispute resolution are really about the appropriate discourse within which certain kinds of problematic relations "ought(!)" to be discussed — therapeutic, moral, political, legal. *See* PITKIN, WITTGENSTEIN AND JUSTICE 151-52 (1972) (attempting to identify and relativize the "moral" mode of addressing interpersonal conflict). An adequate answer requires a careful analysis of the "spirit" and structure of each of those modes of discourse — what they allow to be brought to light and what they leave unsaid and unexamined.

31. Lifting the relationship into the medium of words in a context of equality may,

by which the relationship between the parties is *constituted* or, more likely, *reconstituted.*[32]

The "agreement" reached must be viewed as one element in an ongoing relation between the parties in which the process of mediation itself may be a very important part. Additionally, the discussion among contract scholars[33] as to the relative importance of "promise" has a kind of procedural parallel in the disagreements among mediators as to the value of "pure agreement" as opposed to a substantively good agreement in the context of the parties' ongoing relation. There are elements of each emphasis in contract law which resonate strongly with sometimes conflicting values in mediators' self-understanding. And so the issue of the enforceability of mediated agreements is part of a much broader conversation,[34] something the proposed model legislation's deference to developing contract law recognizes.

I want to expand somewhat on the model[35] of mediation and litigation that emerges from a relational perspective. From that perspective, mediation is the process by which the parties undergo a real change in their attitudes toward each other; only it in that way is too pale. Under the relational model, the process of mediation transforms the relationship between the parties while at the same time ensuring that the resulting relationship preserves the identities of the parties. To use the philosophical terms, the relationship is real and internal.[36] However, this relationship is often difficult to construct between two opposing persons.

Though it is customary to contrast mediation with litigation and view the former as "conciliatory" and the latter as adversarial, this is a contrast that ought not be overdone and should, at the very least, be carefully specified. In litigation, the "fight" often takes place through

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of course, have important effects. *See* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); J. HABERMAS, LEGITIMATION CRISIS (1975). Those most suspicious of mediation tend to doubt that the verbal medium does anything to alter preexisting power relationships. *See e.g.,* Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues,* 19 CLEARINGHOUSE REV. 431 (1985).

32. *Compare* Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305 (1971) *with* PITKIN, *supra* note 30, at 151, on the distinctive kind of language used in this attempt to constitute a relationship in which the parties have diverse interests and perspectives yet have a common concern in maintaining a common "public world" or "constitution."

33. This disagreement necessarily has both descriptive and normative elements — it is about both what courts do in fact do and what they ought to do — though that distinction itself has only a limited value.

34. It is no accident that a scholar with a strongly relational notion of contract and with a rich "conservative" appreciation of values implicit in the large range of exchange relations will tend strongly to favor mediation as opposed to litigation as a method of dispute resolution. Whitford, *Ian Macneil's Contribution to Contracts Scholarship,* 1985 WIS. L. REV. 545, 551.

35. *See,* I. G. BARBUR, MYTHS, MODELS, AND PARADIGMS (1974).

36. A. WHITEHEAD, PROCESS AND REALITY (1929); A. WHITEHEAD, SCIENCE AND THE MODERN WORLD (1929).

attorneys, the "violence" is highly stylized,[37] and the party himself can often stay relatively disengaged. In many ways the stance of the pure adversary *is* relatively disengaged since "positions" — even on relatively simple "issues of fact" — tend to be dictated by extrinsic strategic concerns and not by personally engaging the normative questions they present.

In contrast, in mediation the level of interpersonal tension[38] can be much higher than in litigation. This is because in litigation, a party is often a relatively disengaged lay official, merely watching his field commander make all the important decisions in a winner-take-all context.[39] In mediation, the parties themselves must confront each other face to face. However, the function of this confrontation is to encourage each party to "take account" or imagine the other party's perspective in a way that can be very "dis-integrating" or "dis-membering"[40] for the personality that comes to the mediation. The hope is, of course, that the personality may be reintegrated in a way that better accounts for the other's perspective.

As I will note later,[41] mediation has proven most successful in situations where the relationships among the parties are more or less intimate and where some degree of unity as to basic commitments and interests exists. The relationship between mediation and litigation ought to be understood, under this relational model, quite differently in these different contexts. The difficulties in questions of enforceability stem largely from the impossibility of subsuming these different sorts of relations under one generalized formula.

In these ideal situations, the parties are "taking account" of one another's perspectives in a way that aspires to unity of perspective, where each contributes according to his abilities and each receives according to his needs with purity of heart. Lon Fuller suggested, in effect, that this was the "natural home" of mediation.[42] He also recognized, however, that mediation is employed in contexts where there remains far less than full unity of perspective, and where the task is that of "creating unity ... in a context of diversity, rival claims, and conflicting interests."[43] The conversation that goes on in mediation, like politics, is often "neither just manipulative propaganda, nor just a moral concern with the cares and commitments of another person, but rather is something like addressing diverse views in terms which relate their

37. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

38. I use the amorphous "tension" rather than "opposition" or "conflict" since these sports or martial metaphors can easily be misleading.

39. J. SHKLAR, LEGALISM 34-35 (1964).

40. M. TAYLOR, JOURNEYS TO SELFHOOD 159 (1980).

41. *See infra* text accompanying notes 62 to 63.

42. *See infra* text accompanying notes 56 to 59.

43. PITKIN, *supra* note 30, at 215.

separate, plural interests to their common enterprise, to a shared public interest."[44] It is no accident that the language just quoted refers specifically to *political* discourse — to truly deliberative discussion in the classical sense. The degree and manner to which the processes of mediation are analogous to political discourse will vary greatly from context to context, depending on the degree of unity of interest.[45]

I will now trace the natural implication of a relational notion of mediation in situations where unity of interest does not exist. When a "dispute" arises and the situation has become "problematical,"[46] the natural inclination of a relational mode of thought would be to remediate, that is, once again to attempt to readjust the parties' relationship through the medium of words.[47] The question is: What is distinctive about "enforcement," which necessarily means "enforcement through litigation," such that it should be a complement to mediation?

By resorting to litigation, a participant in mediation has decided to "stand on her rights," to move to a forum where the language is generally "rights-based." A number of reasons for such a move are possible. The most obvious is that a process of never-ending mediation could be strategically manipulated by one party to a mediated agreement. More generally, the resort to litigation means that one party will no longer agree to consensual reconstitution of the relationship. Marriage seems the clearest example of a relationship in which mediation is likely to be tried over and over again because of the intimacy of the parties and because the common interest in what is shared is so great. For the same reason, resort to litigation almost always spells the end (or radical transformation) of a marriage. Indeed, given the general non-enforceability of intra-marriage agreements, this is almost true as a matter of law, which says in effect: "If you have to resort to litigation, the marriage is over!"

The whole spirit and language of the litigation forum is designed to protect rights. Litigation is dominated by a concern with lines, thresholds, and categories, and its rhetoric is that of the determination[48] of past facts. Litigation is for this reason "instrumental" and metaphors from the world of craft and construction come naturally to describe it.[49] The rule of law as applied in the courts attempts to maintain a relative

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44. *Id.* at 216.

45. *See* G. KATEB, HANNA ARENDT: POLITICS, CONSCIENCE, AND EVIL 21-22 (1983). He criticizes Arendt for failing to realize that there are many contexts in American life which are more or less public and more or less political in her classical sense.

46. J. DEWEY, LOGIC: THE THEORY OF INQUIRY 35 (1938).

47. Words, of course, do not merely "reflect" the relationship. They are "performative" — they partially (re)constitute the relationship.

48. I choose this word for its instructive ambiguity in this context: to determine is both to "find out" and to "decide."

49. Burns, *Hanna Arendt's Constitutional Thought* in AMOR MUNDI: EXPLORATIONS IN THE FAITH AND THOUGHT OF HANNA ARENDT 157 (J. Bernauer ed. 1986).

stability which hedges "the constant motion of all human affairs, a motion which can never end as long as men are born and die."[50] The possibility of litigation is an admission that not everything is subject to renegotiation at every time.[51] People may thus rely on relative stability in some areas of their lives and businesses so that they can exercise freedom in others. Often, when the parties' relationship is a limited one for specific purposes, nonperformance will effectively end the relationship. Here litigation is often most appropriate. In these relationships, relatively few aspects of the other's concrete situation may be "relevant" outside the business relationship. The distinctions noted here suggest why, in the most general terms, there is a place for both mediation and litigation; these distinctions also suggest that the relationship between mediation and litigation will vary greatly from context to context.

The question still remains as to whether the final mediated agreement should be viewed as binding in subsequent litigation. Again, this is not subject to a single answer, for the very reasons largely implicit in the performance, if not the doctrines, of courts in contracts cases. The important point is that contract law itself — especially in the law as practiced if not the "crystal palace"[52] of the early doctrinal systematizers — already places the agreement in the context of the entire relationship of the parties. It does so necessarily in the context of a relationship where one of the parties has decided to assert his rights. The very existence of contract law, developed through litigation, says that this is *one* situation in which enforcement may be appropriate. Whether the agreement is viewed as a kind of codification of the reconstituted relationship or as a promise (whose meaning is, of course, to be discerned against the background of the parties' past relationship), the many doctrines of contract law allow enormous flexibility and range in the way in which the courts can weigh the words of an agreement.

The promise-centered model of mediation conceived of the mediation procedure as a period of negotiation — bargaining if you will — whose processes are a pure means by which a promise is identified which will control the future.[53] Here the entire goal of the process is to reach a

50. H. ARENDT, THE ORIGINS OF TOTALITARIANISM 465 (1973).

51. Accordingly, the traditional doctrine of contracts law is that courts will not rewrite a contract for the parties. When a court does reconstitute a contractual relation in an important case, the commentators take note. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1982). This shows that the typology developed in the text is only an analytic abstract. As Wallace Stevens said, the "squirming facts escape the squammous mind." *See* T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 107-113 (2d ed. 1979) (describing the corrupting effects of negotiation without law in the administrative enforcement process).

52. Gordon, *supra* note 9, at 566.

53. Goldberg identifies roughly analogous models for the consideration of arbitration, that close to the relational model set out above and a judicial model. *See* Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U.L. REV. 270, at 271-76 (1982).

verbal, usually written, agreement. One moves naturally, though not inevitably,[54] to the conclusion that the agreement, the promise, ought to be enforced through the normal legal processes. Instructively, there is again a parallel here to the classical notion of contract:

> Classical contract law of the type refined so superbly by Williston presupposed a single moment at which the parties reached agreement on all important terms. Before this grand meeting of the minds, there was no contractual liability. And after this point, all important decisions — particularly the determination of the terms governing the relationship and the measurement of the expectation damages — could be reached only by referring to that all encompassing agreement. Classical contract law can be coherently applied to situations in which there is no grand meeting of the minds, even though the parties act as though there is a contract only by denying that contract exists at all. Courts sometimes reach that result, but it often seems harsh because it fails to protect obvious reliance on what the parties believed to be a valid contract. Partly for this reason, this approach is not generally favored today.[55]

What I hope to have shown is that from *either* perspective, the possible sequence of mediation followed by litigation is a sequence that reflects basic societal values and that any attempt to isolate the processes from each other works against these values.

Consideration of the enforceability of mediated agreements, then, requires that we keep two notions in mind without allowing either to overwhelm the other. Litigation may be a necessary complement to mediation in certain contexts; however, mediation alone may be most productive in other contexts. Requiring litigation in mediation contexts beyond those provided for under contract law may cause the disfigurement of mediation as a process developed to care for and heal that vast number of (often unenforceable) "exchange relations." These "exchange relations" have been called "contract in fact."[56] As Ian Macneil

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54. *See supra* text accompanying notes 50 to 55.

55. Whitford, *supra* note 34, at 547 (footnotes omitted).

56. I. MACNEIL, THE NEW SOCIAL CONTRACT 4-5 (1980). Macneil explicitly distinguishes "contract in fact" from "contract in law":

> By contract I mean no more and no less than the relations among parties to the process of projected exchange (sic) into the future .... Let me compare this with a more traditional definition, that in Restatement (Second): "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Now, this is a definition not of contract-in-fact, but of contract-in-law. Under it, any relation, no matter how full of exchange, not potentially giving rise to *legal* remedies or *legal* recognition of duties is not a contract. In our law-ridden society ... this limitation of the contract concept is in some ways less serious than it might seem. Most of our exchange relations do in fact give rise to legal rights. But in Britain, for example, collective bargaining is in theory outside legal enforceability. And there exist in our society exchange relations, of which marriage is but an extreme example, where much occurs to which the law does not, in any practical sense, extend its remedies or recognize legal duties. *Id.* at 4-5 (footnotes omitted).

has stated:

> While law may be an integral part of virtually all contractual relations, one not to be ignored, law is not what contracts are all about. Contracts are about getting things done in the real world — building things, selling things, cooperating in enterprise, achieving power and prestige, sharing and competing in a family structure.... If we wish to understand contract, and indeed if we wish to understand contract law, we must think about exchange and such things first, and law second.[57]

All the problems discussed by the symposium were, in effect, raised specifically by the attempt to maintain this perspective while giving litigation procedures their due.

The relative stability and publicity provided by positive law, formally enforced, is often crucial.[58]

> Positive laws in constitutional government are designed to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born into it. With each new birth, a new beginning is born into the world, a new world has potentially come into being. The stability of the laws corresponds to the constant motion of all human affairs, a motion which can never end as long as men are born and die. The laws hedge in each new beginning and at the same time assure it freedom of movement, the potentiality of something entirely new and unpredictable; the boundaries of positive law are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world, the reality of some continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them.... To abolish the fences of law between men — as tyranny does — means to take away man's liberties and destroy freedom as a living political reality; for the space between men as it is hedged in by laws, is the living space of freedom.[59]

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57. *Id.* at 5.

58. The extent to which legal *formalism* provides stability has been highly controversial at least since the Realist movement. *See* J. Dewey, *Logical Method and the Law,* 10 CORNELL L. Q. 17 (1924). It seems to me that this stability is a function not so much of doctrine as of the distinctive kind of "conservative" rhetoric which necessarily accompanies public practice under the rule of law. The purely *strategic* importance of formality in advancing the interests of disadvantaged groups has been subject to varying evaluations. *Compare* R. Abel, *Informalism: A Tactical Equivalent to Law?* 19 CLEARINGHOUSE REV. 375 (1985) *with* W. Simon, *Legal Informality and Redistributive Politics, Id.* at 384.

59. H. ARENDT, THE ORIGINS OF TOTALITARIANISM 465-66 (1973). Arendt's metaphors must alert one to the dangers implicit in the metaphors of an "organic" society which are often invoked in favor of non-formal procedures for dispute resolution. *See also* J. MACMURRAY, THE FORM OF THE PERSONAL 152-53 (1961):

> [A]n illusory argument ... rests upon the *a priori* analogical interpretation of personal experience through biological concepts. It assumes that we become rational in the process of growing up, and that the more rational we become the more we grow out of our childish phantasies.... It is, indeed, the characteristic myth of the twentieth century. Our superstitious belief that society is — or ought to be — organic, is itself a wish for the irresponsibility of the primitive. For it is primitive

The first general ground for valuing formal legality then, would stress that the very formality of legal proceedings — the almost palpable "distance" that it reflects and creates among participants — schematizes an important human value. Truly intimate relations are for us here below hard to come by: some ineffable intertwining of gift and achievement. The degree to which a political society should present, even as an ideal, the image of informal mutuality, perhaps of an idealized family, presents a basic question of political and social philosophy with a long and complex history.[60] An important perspective here would stress the central place that "relatively impersonal relations" have in human life and might counsel against an unreflective aversion to the procedures that embody such relations even as necessarily second best.

Another general consideration underlying the defense of procedural formality stresses what might be called the tendency toward equality arguably implicit in formal proceedings. For example, after conceding that adversaries in litigation are rarely equal, Richard Abel writes:

> Nevertheless, only within the legal system can advocates even hope to pursue the ideal of equal justice in a society ridden by inequalities of class, race, and gender and dominated by the power of capital and state. Formal law cannot eliminate substantive social inequalities, but it can limit their influence. Law is the sole arena within which unequals can hope to achieve justice. Only equals can risk a confrontation within the informal processes of the economy and the polity. Certainly advocates can imagine, and should strive for, a society that has overcome the inequalities that presently divide us; in such a society, informal processes could play a more prominent role. But until that millennium comes, formality is the best, often the only, defense against power. Informalism is not an equivalent to law, either tactically or morally.[61]

I will return to these very basic questions later, but for now let me say that enforceability, and thus the relationship between mediation and litigation, largely sets the stage for other mediation issues. Much of the discussion on each of the issues focused on exactly this interrelationship between the processes of mediation and the processes of adjudication. One minority view (expressed by a participant in the active practice of litigation) urged that mediated agreements ought not to be enforceable;

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society which is as nearly organic in form as a human society can be, and social development moves away from the organic type — the ideal zero of human association. The more society becomes civilized, the more artificial it is; that is to say, the more it depends upon the artifices of practical rationality. The institutions by which society maintains itself are not natural; they are artifacts, and they are maintained by effort in order to sustain the personal life of men and women, and to prevent a relapse into the barbarism of a nearly organic life.

60. *See* McKeon, *The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution*, 49 INT'L J. ETHICS 297 (1938).

61. R. Abel, *Informalism: A Tactical Equivalent to Law?* 19 CLEARINGHOUSE REV. 375, 383 (1985); *See also* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

any subsequent litigation should be about the underlying claim and not about the mediation and the agreement it produced. The argument was that the possibility that the mediation might be subject to examination and exploration in the very different litigation forum would so affect the attitudes of the parties as to destroy what is distinctive about the mode of social ordering presented by mediation. The proponents of a mediator privilege and mediator immunity were in effect seeking to foster what is distinctive about mediation, through ethical codes, without those codes being "used against" mediators in the hostile, and distinctively adversarial context of litigation. The notion seemed to be that, on the immunity issues, for example, positive developments that would enrich the development of mediation as a preferred method of social ordering would be distorted by the need to keep one eye on what the litigators would do with the development, much like the claim by some medical professionals that the spectra of litigation distorts the practice of medicine.

Underlying the discussion as well were very different conceptions of the "coercive power of the state" and its relationship to the mode of social ordering that mediation offers. Some argued from within what might be called a purely positivist notion of legal institutions. The criteria that were likely to be employed when a case came to be litigated were likely to be alien to the preferences and values of the parties: to be imposed by the distant stranger at the bench after technical and alien rituals. The *coercive* nature of adjudication is viewed as the sign that a doom is being pronounced *ab extra,* without justification in the preferences or the legitimate interests of the parties. Indeed this view is consistent with the attitude that Macaulay has found to prevail among businessmen for whom "state-enforced norms and sanctions in the governance of contract relations"[62] are generally of secondary importance. He characterizes "the occasional resort by private parties to formal legal sanctions as mostly opportunistic and tactical: by going to law, the parties are not appealing to shared values embodied in legal rules, or seeking moral vindication of their position or a just settlement of their disputes; they are usually engaged in maneuvers to improve their bargaining positions."[63] In this view such businessmen are "seen as inhabiting overlapping and to some extent mutually contradicting moral universes of contracting rules, one of which (their private order) supplies the norms that they actually internalize"[64] and which could be brought to bear on any mediated agreement. The legal order, in this picture, provides parties only "an arsenal of strategic weapons in case the relation breaks

62. Gordon, *supra* note 9 at 573.
63. *Id.* at 572.
64. *Id.*

down."[65]

The alternative view found that the coercive power of court-made law merely assured that our moral judgments on matters of public concern, on matters of social ethics, will be effective in the real world.[66] Even Macaulay did not want to be understood as romanticizing informally structured long-term relationships unaffected by formal procedures:

> Power, exploitation, and dependence also are significant. Continuing relationships are not necessarily nice. The value of arrangements locks some people into dependent positions. They can only take orders. The actual lines of a bureaucratic structure may be much more extensive than formal ones. Seemingly independent actors may have little real freedom and discretion in light of the costs of offending dominant parties. Once they face sunk costs and comfortable patterns, the possibility of command rather than negotiation increases. In some situations parties may see relational sanctions as inadequate in view of the risks involved.... [T]oday I would stress that relational sanctions do not always produce cooperation or happy situations. Trust can be misplaced.... When long-term continuing relations do collapse, those disadvantaged often turn to contract law and legal action.[67]

Just as Americans have traditionally transformed their political questions into legal questions, so too we seem inclined to transform substantive legal questions into procedural questions. We have understood that the spirit of the forum within which a question is decided can be at least as important as the substantive standard that the court "applies." It seems that there are important questions of political judgment affecting what sorts of issues are best adjudicated and what sorts are best mediated, and the related question of which procedure ought more to defer to the other. No less subtle are questions concerning the likely effects of different institutionalizations of the mediation-litigation relationship and the collateral rules that "protect" the processes from one another. All these questions are and ought to be highly context-specific.

V. BARGAINING ABOUT ENFORCEABILITY

Finally, I want to discuss briefly the issue of whether mediated agreements should be unenforceable absent an explicit agreement providing for enforceability. Minnesota's Civil Mediation Act[68] embodies these issues in a clear fashion. The statute provides:

> *Effect of mediated settlement agreement.* The effect of a mediated set-

65. *Id.* at 572-73.
66. Fiss, *supra* note 61.
67. Macaulay, *An Empirical View of Contract,* 1985 WIS. L. R. 469, 471 (1985) (footnotes omitted).
68. MINN. STAT. § 572.35 (1986).

> tlement agreement shall be determined under principles of law applicable to contract. A mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their legal rights.[69]

California's original Neighborhood Dispute Resolution Bill likewise provided that agreement to participate in a dispute resolution process was not binding: "Nothing in this chapter shall be construed to prohibit any person who voluntarily consents to dispute resolution from revoking his consent, withdrawing from dispute resolution, and seeking judicial redress prior to reaching an agreement."[70] The bill took a similarly restrictive attitude toward the enforceability of the substantive provisions of mediated agreements: "A written resolution agreement shall not be enforceable in a court nor shall it be admissible as evidence in any judicial or administrative proceeding unless such agreement contains a provision which clearly sets forth the intent of the parties that such agreement shall be enforceable in a court or admissible as evidence."[71] The latter provision would, in effect, reverse the usual legal effect of an agreement where the elements of contract formation were present. What arguments might support this position?

In general, there is no legal necessity for parties to know that they are binding themselves contractually. One concern seems to be that persons may easily misconstrue the relatively "personal" context of mediation and may think that they move solely within the world of consensual ordering. The question is whether there is need for a rule that *focuses* the attention of the parties in mediation on the issue of enforceability. One answer turns again largely on basic philosophical commitments toward the status of legal "coercion."

Another answer might focus on the special characteristics of mediation as a form of social ordering, a subject on which Lon Fuller has written perhaps the classic article in legal literature.[72] Fuller argued that mediation was especially appropriate under certain circumstances such as when two parties are locked in a situation of bilateral monopoly, and

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69. It appears that the provision that the agreement is binding does not serve to limit the normal application of contract principles to the evaluation of the agreement. It is an additional requirement.

70. Freedman, *State Legislation on Dispute Resolution* app. I-Calif., *ABA Special Comm. on Alternative Means of Dispute Resolution* (1982) (quoting AB 2730 § 1143.22, as introduced Mar. 4, 1980).

71. *Id.* (quoting AB 2730 § 1143.19(c) as introduced Mar. 4, 1980).

72. Fuller, *supra* note 32.

agreement is necessary for the continued existence of the parties. It is also appropriate where there is some element of economic trade in the interaction, but beyond that, each has an interest in creating a constitution, that is, a set of words that would allow them to live together successfully in a way that relates their plural interests to their joint endeavor.[73]

Fuller identified the central quality of mediation as "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attitudes and dispositions toward one another."[74] This characteristic "becomes most visible when the proper function of the mediator turns out to be, not that of inducing the parties to accept formal rules for the governance of their future relations, but that of helping them to free themselves from the encumbrance of rules and of accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies with the aid of formal prescriptions laid down in advance."[75] Indeed, one of the tasks of the mediator might well be to "break up formalized conceptions of 'duty' and to substitute a more fluid sense of mutual trust and shared responsibility[:] . . . instead of working toward achieving a rule-oriented relationship he might devote his efforts, to some degree at least, in exactly the opposite direction."[76] Thus, Fuller claimed, it was no accident that mediation seemed the most appropriate means for addressing disputes within a marriage *and* that contracts apportioning rights and duties within the marriage relationship had, at the time at which he wrote, generally not be enforceable in the courts.[77] The latter is true, he argued, because the legalization that enforcement would entail would be destructive of the trust necessary for a living marriage and that marriage contained too many shifting contingencies for the "rules" contained in act-oriented contracts to be effective.

The suggestion here is that if the focus of the mediation should be the restoration of the relationship between the parties, then focusing the parties' attention on the construction of an agreement that is legally enforceable might distract the parties from the key task, that of restoring the tissue of their relationship. The very focus on issues such as enforceability (and thus, for example, the severability of unenforceable provisions) would contribute to the same "legalization" that mediation promises to cure.

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73. *Id.* at 309-12. Fuller also indicated that examining mediation in the labor-management collective bargaining setting is particularly helpful for analyzing mediation's characteristics and its applicability to other situations.

74. *Id.* at 325.

75. *Id.* at 325-26.

76. *Id.* at 326.

77. *Id.* at 330-32.

It is, for example, the perceived increase in "legalization" of the processes of arbitration and resulting alienation of workers from that process that led Goldberg to propose a modified mediation method for the resolution of contract grievances:

> The mediation process, however, compels a different approach. It eliminates the concept of "winning" a grievance, substituting the concept of negotiations leading to a mutually satisfactory resolution. To the extent that the parties focus on seeking a mutually satisfactory outcome through negotiations, they should develop a mutual understanding of each other's concerns. This mutual understanding, in turn, should lead not only to the resolution of more grievances without resort to mediation or arbitration, but also to the improvement of their entire relationship.[78]

Both Goldberg and Fuller present typologies which attempt to specify what kinds of problems arising in various relationships are most suitable for mediation. Fuller, for example, argues that mediation is inappropriate in circumstances where human relationships are best ordered by act-oriented rules:

> It is not difficult to see why, under a system of state-made law, the standard measure of dispute settlement should be adjudication and not mediation. If the question is whether A drove through a red light ... even the most ardent advocate of conciliative procedures would hardly recommend mediation as the standard way of dealing with such problems. A pervasive use of mediation could here obliterate the essential guideposts and boundary markers men need in orienting their actions toward one another and could end by producing a situation in which one could know precisely where he stood or how he might get where he wanted to be.... [T]here are circumstances in which it is essential to work hard toward keeping things black and white. Maintaining a legal system in functioning order is one of those occasions.[79]

Fuller suggests that while mediation should not be used when the relationship is best organized by impersonal act-oriented rules, it *cannot* be used where the problem presented is not amenable to solution through mediational processes.[80] More concretely, Goldberg suggests that mediation is relatively unsuitable for grievances that turn on complex factual issues, those that raise issues in which the reasoning is more important than the result, and where the interests of the parties are so great and their positions so strongly held that they are unlikely to reach a compromise settlement or to accept an advisory opinion. Goldberg

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78. Goldberg, *supra* note 53 at 283.

79. Fuller, *supra* note 32 at 328. *See* Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

80. Fuller, *supra* note 32 at 330.

does add that even under those circumstances mediation will often lead to a solution, often a solution more responsive to the parties' real interests than one that might be imposed in adjudication.[81]

In other words, mediation may be used (and useful) in a continuum of circumstances, some of which are relatively far removed from what Fuller takes to be the "natural home" of mediation, which is dispute resolution within an ongoing marriage.[82] At the opposite end of the continuum are situations in which a lawsuit has been filed before the parties enter mediation, and the parties, who may have an ongoing relationship or perhaps are engaged in a one-time transaction, are thus formal adversaries. State legislation that would limit enforceability might also limit the range of disputes for which mediation was a significant option, at least if enforceability were generally denied.

A conclusion that the parties ought not to *focus* on enforceability does not mean that the agreement ought not to be enforceable. Enforceability perhaps may not be something that ought to be "bargained over." Its importance may be that it acts as a vague threat, a kind of legitimation in both the senses of rightness *and* effectiveness.[83] If so, enforceability may perhaps be a kind of background condition not subject to the same kind of bargaining as other issues. The paradox is that the attempt to "delegalize" the process by *focusing* on enforcement as an *issue* may prove self-defeating. The wisdom of the Minnesota rule thus depends on the empirical and normative soundness of the view that making enforceability an explicit subject for the mediation contributes to an empirically identifiable result (compliance?) judged valuable.

This raises the question of what a "good" mediation feature is and, thus necessarily, what a "good" mediation is. One way of identifying the features of good mediation practice is external or statistical: will the feature lead to more persons choosing mediation as their preferred method of dispute resolution and will the feature lead to a higher percentage of mediations resulting in agreements? Without a change in principle one might also ask: will the feature lead to a higher number of mediated agreements that are honored by both parties? One can make the latter an independent value or view it merely as instrumental to the agreement on the assumption that parties will be more likely to agree if they know they are bound. Some persons, of course, may be more likely to agree if they know they are bound, especially if the other party will have to "perform" first, as, for example, by the dismissal of criminal charges or the payment of restitution. Is it then a plausible hypothesis that people who intend to abide by what they agree to will be more likely to agree if they know that the agreement is enforceable?

81. Goldberg, *supra* note 53 at 300-01.
82. See *supra* text at 52-53.
83. MACNEIL, *supra* note 29 at 93.

Is there likely to be a higher level of compliance if the parties explicitly discuss and agree to enforceability, or should enforceability, which is often not a *realistic* option, remain a brooding omnipresence?

It may be that enforceability, even in circumstances where the "relational" and "problem-solving" aspects of the situation are paramount, might serve as a kind of symbol for the seriousness with which the parties should honestly face all the issues that would likely arise as they continue their relationship (even where they would not in fact resort to the courts in the event of a breach). This is what Fuller alluded to in recalling the words of an attorney experienced in putting together complex business arrangements:

> If you negotiate the contract thoroughly, explore carefully the problems that can arise in the course of its administration, work out the proper language to cover the various contingencies that may develop, you can then put the contract in a drawer and forget it. What he meant was that in the exchange that accompanied the negotiation and drafting of the contract the parties would come to understand each other's problems sufficiently so that when difficulties arose they would, as fair and reasonable men, be able to make the appropriate adjustments without referring to the contract itself.[84]

It may thus be that, in *most* contexts, enforceability should remain a "background condition,"[85] unless, as an empirical matter, discussion of and agreement on enforceability is likely to enhance performance.

VI. CONCLUSION

No persuasive general argument exists for giving the mediated nature of an agreement necessary legal consequences. Contract law provides a flexible set of considerations relevant to the issue of enforceability that more adequately structure deliberation about that issue than could any single general rule. The interrelation of mediation and litigation poses special problems for both forms of social ordering, but only a procedural purist would drive a sharp wedge between them, a wedge that would, in the contexts where contract law provides for enforceability, probably reduce the value of mediation. Finally, there are good reasons to think that enforceability should not itself generally be a subject of the mediation, though here there is ample room for further empirical research and normative analysis.

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84. Fuller, *supra* note 32 at 326-27.
85. J. RAWLS, A THEORY OF JUSTICE, 85-89 (1971).